Supreme Court, U.S.
FILED
00-517 AUG 16 2000
OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

WILLIAM MORRIS RISBY,

Petitioner,

versus

UNITED STATES OF AMERICA,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Did the Fifth Circuit depart from this court's jurisprudence concerning the scope of immunity provided by 18 U.S.C. § 6002-6003 when it ruled that the order compelling production of documents before the grand jury did not protect the contents of the documents as a matter of law.

II. Whether the Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is violated in the cumulative punishments assessed on convictions under both 18 U.S.C. §§ 666(a)(1)(B) and 666(a)(2).

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

William Morris Risby petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

CITATION TO OPINIONS BELOW

The opinion of the court of appeals is unpublished. It is reprinted as Appendix 1. The court's denial of motion for rehearing is reprinted as Appendix 13.

JURISDICTION

This is a criminal case heard by the court of appeals under authority of 28 U.S.C. § 1291. The decision of the court of appeals was issued on February 29, 2000. Motion for panel rehearing was denied on May 9, 2000. This Court's jurisdiction is invoked under 28 U.S.C. § 2101(c) and Rules 13(1) & (3), Supreme Court Rules.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides in relevant part:

> . . . nor shall any person be subjected for the same offense to be twice put in jeopardy of life

> or limb; nor shall be compelled in any criminal case to be a witness against himself . . .

18 U.S.C. § 2 provides in relevant part:

> (a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission is punishable as a principal.

18 U.S.C. § 666 provides in relevant part:

> (a) Whoever, . . . (1) being an agent of an organization, or of a State, [or] local . . . government, or an agency thereof – (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5000 or more; or (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of any organization or of a State, [or] local . . . government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5000 or more . . . "

18 U.S.C. § 6002 provides in relevant part:

> Whenever a witness refuses, on the basis of his privilege against self-incrimination, to testify or provide other information in a proceeding before or ancillary to (1) a court or grand jury of the United States . . . and the person presiding

> over the proceeding communicates to the witness an order issued under this title, the witness may not refuse to comply with the order on the basis of his privilege against self-incrimination; but no testimony or other information compelled under the order (or any information directly or indirectly derived from such testimony or other information) may be used against the witness in any criminal case, . . .

18 U.S.C. § 6003 provides:

> (a) In the case of any individual who has been or may be called to testify or provide other information at any proceeding before or ancillary to a court of the United States or a grand jury of the United States, the United States district court for the judicial district in which the proceeding is or may be held shall issue, in accordance with subsection (b) of this section, upon the request of the United States attorney for such district, an order requiring such individual to give testimony or provide other information which he refuses to give or provide on the basis of his privilege against self-incrimination, such order to become effective as provided in section *6002* of this title. (b) A United States attorney may, with the approval of the Attorney General, the Deputy Attorney General, the Associate Attorney General, or any designated Assistant Attorney General or Deputy Assistant Attorney General, request an order under subsection (a) of this section when in his judgment (1) the testimony or other information from such individual may be necessary to the public interest; and (2) such individual has refused or is

likely to refuse to testify or provide other information on the basis of his privilege against self-incrimination.

STATEMENT OF THE CASE

Pursuant to a federal Grand Jury investigation of suspected embezzlement from the Dallas Independent School District, the Government obtained an order from the federal district court under provisions of 18 U.S.C. §§ 6002 and 6003 compelling the production of documents and testimony from petitioner, Mr. William Risby, the sole proprietor of a business called Time Savings. The Order granting immunity to appellant and compelling his production and testimony states in relevant part:

> The immunity granted pursuant to this order is limited to the act of producing the requested records and any testimony relating to the production of said records . . . The immunity granted by this order does not extend to the content of any records provided by William M. Risby in his capacity as Custodian of Records of Time Saving.

Thereafter, petitioner was charged in a 64 count indictment with a violation of 18 U.S.C. § 371 (conspiracy to embezzle, to pay and receive kickbacks, and to launder money) and with violations of 18 U.S.C. § 666(a)(1)(A) & (B), 666(a)(2) and 18 U.S.C. § 2 (aiding and abetting embezzlement, paying kickbacks and aiding and abetting the receipt of those kickbacks, and aiding and abetting money laundering). He was convicted on all 64 counts

and sentenced to a term of 60 months on count 1 (conspiracy) and to a total of 97 months on counts 2-64, the two terms to run concurrently.

The convictions and sentences were affirmed in an unpublished opinion by the United States Court of Appeals for the Fifth Circuit on February 29, 2000. The court's opinion is attached as App. 1. Motion for panel rehearing was denied on May 9, 2000.

REASONS FOR GRANTING THE WRIT

I. The holding by the court of appeals (that the order granting immunity to petitioner did not protect the contents of documents he disclosed to the grand jury) is out of line with this Court's jurisprudence regarding the scope of immunity provided in 18 U.S.C. §§ 6002-6003.

At pre-trial and during trial appellant repeatedly requested that the trial court conduct a *Kastigar* hearing to determine the extent to which the documents and testimony provided to the grand jury by Mr. Risby under grant of immunity had been used to further the investigation against him. *See Kastigar v. United States*, 406 U.S. 441, 460 (1971).

The Government took the position that the scope of immunity actually awarded Mr. Risby by the Magistrate's Order is limited to the language of that Order, (Brief for the United States, pp. 14-15), and, thus, that no basis for a *Kastigar* hearing existed. The government argued alternatively that, in any case, the immunity granted under provisions of 18 U.S.C. §§ 6002 and 6003 did not protect

the content of documents disclosed as a matter of law. The trial court denied petitioner's repeated request for a hearing.

The court of appeals disposes of the *Kastigar* issue by saying "The record shows that the immunity granted to Risby did not extend to the contents of any records he produced". (Op. p. 2) (App. 1). Thus, the court has resolved the *Kastigar* issue relying on the legal conclusion either (1) that the language of the order is the limit of immunity conferred under 18 U.S.C. §§ 6001, *et seq.*, or (2) that the content of documents produced pursuant to an order obtained under 18 U.S.C. §§ 6001, *et seq.* is not protected as a matter of law.

In fact, the scope of immunity granted by an order procured under 18 U.S.C. §§ 6002 and 6003 is co-extensive with the privilege against self-incrimination provision of the Fifth Amendment and is governed by the language of 18 U.S.C. §§ 6002 and 6003. *Kastigar v. United States*, 406 U.S. 441, 460 (1971). The scope of immunity afforded under 18 U.S.C. §§ 6002 and 6003 has been addressed by this Court in *Fisher v. United States*, 425 U.S. 391 (1976), and in *United States v. Doe*, 465 U.S. 605 (1984) (*Doe I*) and *Doe v. United States*, 487 U.S. 201 (1988) (*Doe II*), and most recently in *United States v. Hubbell*, ___ U.S. ___ (No. 99-166, June 6, 2000).

The position taken by the government in this case is like its position taken in *Hubbell*: No violation of the immunity provisions of 18 U.S.C. §§ 6002-6003 can be shown to have occurred where the Government does not intend to advert to testimony before the grand jury nor to offer in evidence the documents procured. The support

for this position is that the communicative aspect of the act of producing ordinary business records is not sufficiently "testimonial" to support a claim of privilege, and, thus, that it is not necessary for the Government "to prove that the evidence it proposes to use is derived from a legitimate source wholly independent of the compelled testimony." *See Ullmann v. United States*, 350 U.S. 422, 460 (1956).

The Fifth Circuit's reading of the immunity offered by 18 U.S.C. §§ 6002 and 6003, that the immunity granted by 18 U.S.C. §§ 6002 and 6003 does not extend to the contents of documents produced, is like that adopted by the dissent in the D.C. Court of Appeals in *United States v. Hubbell*, 167 F.3d 552, 602 (CADC 1999) and repudiated by this Court in *United States v. Hubbell*, ___ U.S. ___ (No. 99-166, June 6, 2000).

The Fifth Circuit's reading of the protection of 18 U.S.C. §§ 6002 and 6003 is clearly and unambiguously out of line with this Court's decisions in *Kastigar v. United States*, 406 U.S. 441, 460 (1971) and *United States v. Hubbell*, ___ U.S. ___ (No. 99166, June 6, 2000). However, at the time the court of appeals made its decision in the present case the court did not have the benefit of this Court's decision in *Hubbell*.

Petitioner prays that this Court issue its writ of certiorari to The United States Court of Appeals for the Fifth Circuit and remand to that court for reconsideration of its decision in light of *Hubbell*.

II. The Double Jeopardy Clause of the Fifth Amendment to the United States Constitution is violated in the cumulative punishments assessed on convictions under 18 U.S.C. 666(a)(1)(B) and 666(a)(2).

The Government alleged a scheme between petitioner Risby and another (Hargrave) by which petitioner made payments to Hargrave in exchange for Hargrave's representation to his employer, the Dallas Independent School District (DISD), that contract work by petitioner's company "Time Saving" had been completed when, in fact, the work had not been done. The scheme allowed petitioner to receive money from DISD when, in fact, the work had not been done.

Petitioner was convicted of paying bribes to an agent of state or local government (Hargrave), 18 U.S.C. § 666(a)(2) (Counts 20-38), and for aiding that payee (Hargrave) to receive those payments from him, 18 U.S.C. § 666(a)(1)(B), 18 U.S.C. § 2 (Counts 39-57). In fact, a person convicted under the terms of 18 U.S.C. § 2, aiding and abetting another to commit a crime, is convicted as a principle. *See United States v. Payan*, 992 F.2d 1387, 1390 (5th Cir. 1993). Thus, in the present case petitioner is punished as a principle for making the payments (18 U.S.C. § 666(a)(2) and as a principle for receiving those same payments. (18 U.S.C. § 2, 666(a)(1)(B)). The crimes alleged in Counts 20-38 (payments) and Counts 39-57 (receipt of the payments) are punished separately and cumulatively.

Petitioner challenged the multiple punishments assessed in Counts 20-38 and 39-57 on the basis that these multiple punishments violate the Double Jeopardy Clause

of the United States Constitution. The Fifth Circuit held: " . . . because the offenses in Counts 20-38 required proof of additional facts that the offenses in Counts 39-57 did not require, *see Blockburger v. United States*, 284 U.S. 299 (1932), . . . Risby's contention that he received multiple punishments for the same offense is . . . without merit". (Op. 2). This answer is insufficient because it does not address whether congress intended that multiple convictions and punishments can arise in this situation.

18 U.S.C. § 666 reads in relevant part:

> (a) Whoever, . . . (1) being an agent of an organization, or of a State, [or] local, ... government, or an agency thereof – (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5000 or more; or (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of any organization or of a State, [or] local . . . government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5000 or more . . . "

While the payor of a bribe can be convicted, as a principle, of accepting that bribe (aiding the receipt), *see United States v. Sutton*, 801 F.2d 1346, 1358 (D.C. Cir. 1986), the only case counsel can find in which a defendant was punished both for paying a bribe and, under 18

U.S.C. § 2, for receiving that same bribe is *United States v. Kenner*, 354 F.2d 280, 285 (2nd Cir. 1965), *cert. denied*, 86 S.Ct. 1223 (1966). In *Kenner* the punishment for paying the bribe and the punishment for receiving the bribe were set to run concurrently, and the court found that it could uphold the convictions and sentences if it could find support for any one of the convictions. This is not the situation in the present case where the punishments for violations under counts 39-57 are stacked on those for counts 20-38.

It is irrational to assume that Congress intended that a person paying a bribe to an agent of state or local government under 18 U.S.C. §§ 666(a)(2) might also be convicted and punished for receiving that same payment under 18 U.S.C. § 666(a)(1)(B) and 18 U.S.C. § 2. In the either/or language of the statute there is every reason to assume that congress intended that one or the other means of committing an offense under § 666 would be prosecuted.

In the present case each payment is divided into two part's, the front end (the payment – 666(a)(2)) and the back end (the receipt of the payment – 666(a)(1)(B). Surely Congress did not intend punishment of the payor both for payment and receipt of the same bribe. If the Fifth Circuit's understanding of § 666 is left standing all bribes can be double punished.

It is obvious that any means by which petitioner would undertake to insure that the payee (Hargrave) received his payment would be evidence that petitioner aided Hargrave in receiving that payment, and, thus, that petitioner could be punished as a principle in the crime of

solicitation and receipt of that bribe. According to the Fifth Circuit a violation of the Double Jeopardy Clause could not be found under *Blockburger* where, as here, each crime (payment and receipt) is defined by different elements. The decision of the Fifth Circuit is insufficient to resolve the question because it fails to address the intent of congress.

Petitioner prays that this Court issue its writ of certiorari to the Court of Appeals for the Fifth Circuit, and set aside the convictions and sentences assessed on counts 39-57.

Respectfully submitted

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Attorney for Petitioner

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-11336
Summary Calendar

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

WILLIAM MORRIS RISBY,

Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:98-CR-94-1-H

(Filed Feb. 29, 2000)

Before JOLLY, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:*

William Morris Risby appeals from his convictions and sentence for conspiracy to embezzle, pay and receive kickbacks, and money laundering; aiding and abetting embezzlement; aiding and abetting receiving kickbacks; and aiding and abetting money laundering. He argues that the district court erred by refusing to conduct a *Kastigar* hearing, that he received multiple punishments

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* Pursuant to 5th CIR. R. 47.5, the court has determined that this opinion should not be published and is not precedent except under the limited circumstances set forth in 5th CIR. R. 47.5.4.

for the same offense, that the district court abused its discretion by limiting Risby's cross-examination of witness George Garrett and codefendant James Hargrave, and that the district court erred by increasing Risby's offense level pursuant to U.S.S.G. § 3C1.1 for obstruction of justice. We have reviewed the record and find no reversible error. The record shows that the immunity granted to Risby did not extend to the contents of any records he produced. Further, because the offenses in Counts 20-38 required proof of additional facts that the offenses in Counts 39-57 did not require, *see Blockburger v. United States*, 284 U.S. 299 (1932), and because the substantive offenses for which Risby was convicted did not necessarily require the participation and cooperation of two persons, *see United States v. Payan*, 992 F.2d 1387, 1389-90 (5th Cir. 1993), Risby's contention that he received multiple punishments for the same offense is also without merit. The district court did not abuse its discretion by limiting Risby's cross-examination of two witnesses. *See* Fed. R. Evid. 608(b). Finally, given the information contained in the PSR, the district court did not err by increasing Risby's base offense level by two for obstruction of justice. Accordingly, the judgment of the district court is AFFIRMED.

AFFIRMED.

United States District Court

Northern District of Texas
DALLAS Division

UNITED STATES OF AMERICA

v.

WILLIAM MORRIS RISBY

Defendant.

Case Number
3:98-CR-094-H(01)

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

(Filed Nov. 10, 1998)

The defendant, WILLIAM MORRIS RISBY, was represented by Russell Wilson, II.

The defendant was found guilty on counts 1 through 64 by a jury verdict on August 7, 1998 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such counts, involving the following offenses:

Title of Section	Nature of Offense	Date of Offense	Count Number(s)
18 USC § 371	Conspiracy to Embezzle, Pay and Receive Kickbacks, and Money Laundering	May 31, 1997	1

18 USC §§ 666 (a)(1)(A) & 2	Embezzlement, Aiding and Abetting	April 1, 1996	2
		July 1, 1996	3
		April 23, 1996	4 and 5
		July 30, 1996	6
		May 10, 1996	7
		May 20, 1996	8
		April 7, 1997	9
		July 1, 1996	10
		June 4, 1996	11
		January 22, 1997	12 and 14
		February 23, 1997	13
		February 3, 1997	15
		April 15, 1997	16 and 17
		March 25, 1997	18
		April 7, 1997	19
18 USC §§ 666 (a)(2) & 2	Paying Kickbacks, Aiding and Abetting	August 1, 1994	20
		April 21, 1995	21
		May 2, 1995	22
		June 20, 1995	23
		June 22, 1995	24
		July 11, 1995	25
		July 26, 1995	26
		August 16, 1995	27
		October 27, 1995	28
		November 22, 1995	29
		November 26, 1995	30
		December 12, 1995	31
		January 12, 1996	32
		April 30, 1996	33
		May 22, 1996	34
		June 27, 1996	35
		July 6, 1996	36
		August 8, 1996	37
		January 6, 1997	38

18 USC	Receiving	August 1, 1994	39
§§ 666	Kickbacks,	April 21, 1995	40
(a)(1)(B)	Aiding and	May 2, 1995	41
& 2	Abetting	June 20, 1995	42
		June 22, 1995	43
		July 11, 1995	44
		July 26, 1995	45
		August 16, 1995	46
		October 27, 1995	47
		November 22, 1995	48
		November 26, 1995	49
		December 12, 1995	50
		January 12, 1996	51
		April 30, 1996	52
		May 22, 1996	53
		June 27, 1996	54
		July 6, 1996	55
		August 8, 1996	56
		January 6, 1997	57
18 USC	Money	January 12, 1996	58
§§ 1956	Laundering,	April 30, 1996	59
(a)(1)	Aiding and	May 22, 1996	60
(B)(i)	Abetting	June 27, 1996	61
& 2		July 6, 1996	62
		August 8, 1996	63
		January 6, 1997	64

As pronounced on November 5, 1998, the defendant is sentenced as provided in pages 1 through 6 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States a special assessment of $6,400, being $100 for each of counts 1 through 64, which shall be due

immediately. Said special assessment shall be made to the Clerk, U.S. District Court.

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this the 10th day of November, 1998.

/s/ Barefoot Sanders
BAREFOOT SANDERS
SENIOR UNITED STATES
DISTRICT JUDGE

Defendant's SSN: 454-04-6743
Defendant's Date of Birth: 1/8/57
Defendant's Address: 2442 Club Manor,
Dallas, Texas 75237
Defendant's USM No: 31495-077

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 60 months on Count 1, and a term of 97 months on each of Counts 2 through 64, with all terms to be served concurrently.

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons on or before 2:00 p.m., January 6, 1999.

RETURN

I have executed this Judgment as follows:

_____

_____

Defendant delivered on _____ to _____ at _____, with a certified copy of this Judgment.

_____
United States Marshal

By _____
Deputy Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years on each of Counts 1 through 64, said terms to run concurrent with each other.

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

The defendant shall not commit another federal, state, or local crime.

The defendant shall not illegally possess a controlled substance.

For offenses committed on or after September 13, 1994:

The defendant shall refrain from any unlawful use of a controlled substance. The defendant shall submit to one drug test within 15 days of release from imprisonment

and at least two periodic drug tests thereafter, as directed by the probation officer.

• The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable)

• The defendant shall not possess a firearm as defined in 18 U.S.C. § 921. (Check, if applicable)

If this judgment imposes a fine or a restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine or restitution that remains unpaid at the commencement of the term of supervised release in accordance with the Fine and Restitution sheet of the judgment.

The defendant shall comply with the standard conditions that have been adopted by this court (set forth below). The defendant shall also comply with the additional conditions on the attached page.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer 10 days prior to any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to

confirm the defendant's compliance with such notification requirement.

SPECIAL CONDITIONS OF SUPERVISION

While the Defendant is on supervised release pursuant to this Judgment:

Pursuant to the Mandatory Victim Restitution Act of 1996, the defendant shall make restitution jointly and severally with co-defendant James Hargrave in the amount of $300,000.00, payable to the U.S. District Clerk for disbursement to: Dallas Independent School District. Payment shall begin while the defendant is incarcerated, and the balance shall be payable through monthly installments of at least $500.00. Further, pursuant to 18 USC § 3612(f)(3), the Court shall waive interest on the restitution.

The defendant shall refrain from incurring new credit charges or opening additional lines of credit without approval of the probation officer unless the probation officer makes a determination that the defendant is in compliance with the payment schedule.

The defendant shall provide to the probation officer any requested financial information.

The defendant shall not enter into any self-employment while under supervision without prior approval of the probation officer.

RESTITUTION

The defendant shall make restitution to the following:

Name of Payee	Amount of Restitution
Dallas Independent School District Attn: Robbie Collins 3700 Ross Avenue Dallas, Texas 75201	$300,000.00

Payments of restitution are to be made jointly and severally with co-defendant James Hargrave to the United States District Clerk.

The defendant shall make immediate restitution in the amount of $100,000.00, and the remaining balance of $200,000.00, which shall begin while the defendant is incarcerated, shall be made payable through monthly installments of at least $500 per month.

The Court determines that the defendant does not have the ability to pay interest and therefore waives the interest requirement pursuant to 18 U.S.C. § 3612(f)(3).

STATEMENT OF REASONS

The court adopts the factual findings and guideline application in the presentence report.

Guideline Range Determined by the Court:

Total Offense Level:	26
Criminal History Category:	III
Imprisonment Range:	78 months to 97 months.
Supervised Release Range:	2 to 3 years
Fine Range:	$ 12,500 to $ 3,500,000
Restitution:	$ 300,000

The fine is waived because of the defendant's inability to pay.

Full restitution is not ordered for the following reason: Because of the defendant's inability to pay.

The sentence is within the guideline range, that range does not exceed 24 months, and the Court finds no reason to depart from the sentence called for by the application of the guidelines.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 98-11336

UNITED STATES OF AMERICA

Plaintiff - Appellee

Filed
May 9, 2000

v.

WILLIAM MORRIS RISBY

Defendant - Appellant

Appeal from the United States District Court
for the Northern District of Texas, Dallas

ON PETITION FOR REHEARING

Before JOLLY, JONES, and BENAVIDES, Circuit Judges.

PER CURIAM:

IT IS ORDERED that the petition for rehearing filed is DENIED.

ENTERED FOR THE COURT:

/s/ Illegible
United States Circuit Judge

REHG-2

Supreme Court, U.S.
FILED
JAN 5 2001
OFFICE OF THE CLERK

(2)

No. 00-517

In the Supreme Court of the United States

WILLIAM MORRIS RISBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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13 pp

QUESTIONS PRESENTED

1. Whether the courts below correctly found that the government adhered to the scope of the use immunity granted to petitioner with respect to the production of documents to the grand jury.

2. Whether petitioner's conviction and punishment for violations of 18 U.S.C. 666(a)(1)(B) and (a)(2) are barred by the Double Jeopardy Clause of the Fifth Amendment.

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In the Supreme Court of the United States

No. 00-517

WILLIAM MORRIS RISBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The per curiam opinion of the court of appeals (Pet. App. 1-2) is not reported, but the judgment is noted at 211 F.3d 124 (Table).

JURISDICTION

The judgment of the court of appeals was entered on February 29, 2000. A petition for rehearing was denied on May 9, 2000. Pet. App. 13. The petition for a writ of certiorari was not filed until August 16, 2000, and therefore is out of time under Rule 13 of the Rules of this Court. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial, petitioner was convicted on one count of conspiring to embezzle federal funds, pay and receive kickbacks, and money laundering, in violation of 18 U.S.C. 371, 666, and 1956. He also was convicted on 18 counts of embezzlement of federal funds (18 U.S.C. 2 and 666(a)(1)(B)); 19 counts of paying kickbacks to an agent of a local government (18 U.S.C. 2 and 666(a)(2)); 19 counts of receiving kickbacks in connection with the business of a local government agency (18 U.S.C. 2 and 666(a)(1)(B)); and seven counts of money laundering (18 U.S.C. 2 and 1956(a)(1)(B)(i)). He was sentenced to 97 months' imprisonment. The court of appeals affirmed petitioner's convictions and sentence in an unpublished per curiam decision. Pet. App. 1-2.

1. Petitioner paid kickbacks to James Hargrave, a roofing inspector for the Dallas Independent School District (DISD), to procure contracts and falsify that petitioner's company performed roofing repairs on the district's properties. Gov't C.A. Br. 3. At the time, petitioner was doing business under the company name of Time Saving Construction. The grand jury subpoenaed numerous documents from banks, subcontractors, and the DISD. Those documents formed the basis for petitioner's prosecution and were introduced into evidence at trial. *Id.* at 3-4.

After reviewing those documents, the prosecutor was unsure whether there were additional documents in the possession of Time Saving, petitioner's company. The grand jury subpoenaed documents from the custodian of Time Saving. In response to that subpoena, petitioner's attorney provided several notebooks that contained copies of records. Petitioner had no hand in the production of those documents. Gov't C.A. Br. 4.

Review of those records revealed that they were copies, not originals, and that they had been altered. As a result, the grand jury issued a second subpoena to Time Saving requesting original records. The prosecutor also asked that the corporation identify a custodian of records. *Ibid.* Petitioner's lawyer identified petitioner as the custodian and petitioner moved to quash the subpoena. *Ibid.*

In response, the government sought, and the district court granted, an order conferring act-of-production immunity on petitioner. Gov't C.A. Br. 5. The order was narrowly crafted to restrict the grant of immunity and stated in pertinent part:

> The immunity granted pursuant to this order is limited to the act of producing the requested records and any testimony relating to the production of said records * * *. The immunity granted by this order does not extend to the content of any records provided by [petitioner] in his capacity as Custodian of Records of Time Saving.

Pet. 4. Petitioner appeared before the grand jury on February 18, 1998, and produced originals of some of the documents that the grand jury had already seen. Petitioner also told the grand jury that, several months earlier, the government had acquired records from other sources, including petitioner's accountant. Gov't C.A. Br. 5 . During petitioner's appearance, the prosecutor limited his questioning to whether petitioner was custodian of the records, whether he understood the limits of the grant of immunity to him, and whether he had produced all records that he possessed. *Ibid.*

After he was indicted on the instant charges, petitioner moved to dismiss the indictment on the ground that the government had used his immunized testimony

against him and requested a hearing pursuant to *Kastigar* v. *United States*, 406 U.S. 441, 460 (1972), requiring the government to establish that the evidence supporting the indictment came from sources wholly independent of testimony given under the immunity grant. In response, the government provided the district court with copies of subpoenas establishing that it had obtained the evidence likely to be used against petitioner from independent sources well before petitioner testified before the grand jury. In addition, the prosecutor assured the court that the government would not use at trial or make reference to any of the records that petitioner had produced in response to the subpoena. Gov't C.A. Br. 5-6. The district court denied petitioner's motion.

At trial, the government, in accordance with its prior representations, did not use or refer to the documents that petitioner presented to the grand jury or the testimony he gave before the grand jury. In addition, the government sought to ensure that the source of all the documents used at trial was clearly identified and explained by each witness who sponsored the exhibits into evidence. The dates on the subpoenas confirmed that the government possessed this evidence before petitioner's grand jury appearance. Gov't C.A. Br. 6, 11-15.

2. On appeal, petitioner claimed, *inter alia*, that his indictment should have been dismissed because the government impermissibly used his immunized testimony. He also claimed, for the first time, that he was improperly convicted of both giving and accepting kickbacks, and that those counts should have merged. The court of appeals rejected those arguments and affirmed in an unpublished per curiam decision. Pet. App. 1-2. In so holding, the court found that "[t]he

record shows that the immunity granted to [petitioner] did not extend to the contents of any records he produced." *Id.* at 2. The court also held that petitioner's Section 666(a)(1)(B) and (a)(2) convictions did not constitute multiple punishments, because each required proof of facts that the other offense did not require. *Ibid.*

ARGUMENT

1. Petitioner contends (Pet. 5-7) that the decision below is incorrect under this Court's decision in *United States* v. *Hubbell*, 120 S. Ct. 2037 (2000). Contrary to petitioner's claim, the courts below properly concluded that the government did not make any use of the documents that petitioner produced pursuant to the limited grant of immunity. There is no reason for this Court to review that fact-bound determination here, or to remand for reconsideration of that finding in light of *Hubbell*.

In *Hubbell*, the defendant received a subpoena duces tecum calling for the production of 11 different categories of documents to the grand jury. After he invoked his Fifth Amendment privilege against self-incrimination, the defendant was granted use immunity under 18 U.S.C. 6002, and he thereafter produced some 13,000 pages of documents in response to the subpoena. He also answered questions concerning whether those documents were responsive to the grand jury's subpoena. 120 S. Ct. at 2040. The contents of the documents that the defendant produced led to his indictment for mail fraud, wire fraud, and tax fraud. The district court dismissed his indictment on the ground that all the evidence used at trial was "derived either directly or indirectly from the testimonial aspects of [the defendant's] immunized act of producing those

documents." *Id.* at 2041. The court of appeals reversed on the ground that the district court should have determined whether the Independent Counsel had prior awareness of the documents. *Ibid.*

This Court affirmed. The Court focused on "the testimony inherent in the act of producing" documents to the grand jury, rather than on the contents of the documents themselves. 120 S. Ct. at 2045-2046. Because of the large volume of documents requested by the subpoena, the Court reasoned that "the collection and production of the materials demanded was tantamount to answering a series of interrogatories asking a witness to disclose the existence and location of particular documents fitting certain broad descriptions." *Id.* at 2046. See *ibid.* ("Entirely apart from the contents of the 13,120 pages of materials that respondent produced in this case, it is undeniable that providing a catalog of existing documents fitting within any of the 11 broadly worded subpoena categories could provide a prosecutor with a 'lead to incriminating evidence,' or 'a link in the chain of evidence needed to prosecute.'"). That fact, according to the Court, gave the production a "testimonial aspect." *Id.* at 2048. As a result, the Court held that the indictment had to be dismissed unless the government could show that the evidence used to obtain the indictment was "wholly independent" of the testimonial aspect of the defendant's immunized conduct in assembling and producing the documents. *Ibid.* The Court concluded that the government "does not claim that it could make such a showing." *Ibid.*

The circumstances in *Hubbell* are far different from those here. To begin with, the production at issue in this case was much more limited than the one in *Hubbell*, and was preceded by previous productions that were not subject to any claim of immunity. In

Hubbell, the Independent Counsel did not have any documentary evidence against the defendant until the defendant himself provided those documents to the grand jury, and this Court concluded that the government did not attempt to show that the evidence was obtained from "wholly independent" sources. 120 S. Ct. at 2048. Here, the prosecutor conclusively demonstrated to the district court that the government had assembled its evidence against petitioner well before his grand jury appearance from documents obtained in response to other subpoenas. The government also showed that it had not used any leads from the information that petitioner had provided to the grand jury in its prosecution against petitioner. Indeed, the prosecutor demonstrated that all the government's trial evidence came from sources that predated petitioner's grand jury appearance. See Gov't C.A. Br. 11-15 (discussing evidence).

In *Hubbell*, this Court reaffirmed "the critical importance of protection against a future prosecution based on knowledge and sources of information *obtained from the compelled testimony*." 120 S. Ct. at 2045 (emphasis added; internal quotation marks omitted). Nothing "obtained from the compelled testimony" in this case was used to prosecute petitioner, and he is accordingly not entitled to any relief under *Hubbell*.[1]

2. Petitioner also argues (Pet. 8-11) that his convictions under 18 U.S.C. 666(a)(1)(B) and (a)(2) subject him to multiple punishments for the same offense, in violation of the Double Jeopardy Clause of the Fifth

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[1] In any event, we note that the immunity granted to petitioner was quite limited. The scope of petitioner's immunity specifically allowed the government to make derivative use of any information that petitioner provided. See Gov't C.A. Br. 14.

Amendment to the Constitution. The court of appeals correctly rejected that claim.[2]

Section 666(a)(2) prohibits a person from giving or offering anything of value to an agent of a local government in connection with any business before the local government. Section 666(a)(1)(B), on the other hand, makes it illegal for an agent of a local government to solicit or demand anything of value in connection with business before the local government.[3] Petitioner acknowledges (Pet. 9) that the two offenses are different within the meaning of the rule of *Blockburger* v. *United States*, 284 U.S. 299 (1932), because each offense involves an element that is not contained in the other offense. For the jury to convict petitioner of *giving* a bribe, the jury was required to find that peti-

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[2] As noted above, petitioner failed to raise this argument in the trial court. The court of appeals addressed and rejected the argument without addressing that default. Pet. App. 2.

[3] Section 666 provides in pertinent part:

> (a) Whoever * * * (1) being an agent of an organization, or of a State, local, or Indian tribal government, or any agency thereof—
>
> * * * * *
>
> (B) corruptly solicits or demands for the benefit of any person, or accepts or agrees to accept, anything of value from any person, intending to be influenced or rewarded in connection with any business, transaction, or series of transactions of such organization, government, or agency involving any thing of value of $5,000 or more; or
>
> (2) corruptly gives, offers, or agrees to give anything of value to any person, with intent to influence or reward an agent of an organization or of a State, local or Indian tribal government, or any agency thereof, in connection with any business, transaction, or series of transactions of such organization, government, or agency involving anything of value of $5,000 or more.

tioner corruptly intended to influence Hargrave's official actions, without regard to the intent of Hargrave. By contrast, for the jury to convict petitioner on the Section 666(a)(1)(B) counts, the jury was required to find that Hargrave intended to be influenced by petitioner, and that petitioner thereby aided and abetted the receipt of the bribe. See *United States* v. *Jennings*, 160 F.3d 1006, 1017 (4th Cir. 1998). In short, the "giving" of bribes by petitioner and "acceptance" of bribes by Hargrave, as aided and abetted by petitioner, are different acts requiring different elements of proof.

Without reference to any specific evidence, petitioner argues (Pet. 10) that Congress did not intent that result. Contrary to petitioner, Congress certainly could have contemplated that a defendant who successfully bribed a public employee could be punished under both sections. See, *e.g.*, *United States* v. *Barash*, 365 F.2d 395, 399 n.3 (2d Cir. 1966) (recognizing that the government can proceed against a payor of a bribe both as a principal and as an aider and abettor of the recipient of the bribe); *United States* v. *Kenner*, 354 F.2d 780, 785 (2d Cir. 1965) (payor of a bribe can be an aider and abettor of the recipient's receipt of the bribe), cert. denied, 383 U.S. 958 (1966). Hence, the court of appeals properly concluded that petitioner could receive multiple punishments for his Section 666 convictions, and further review by this Court of that ruling is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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